The Solicitors' Journal

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CURRENT TOPICS

The Law Officers

No surprise will be felt by members of the profession that in the new ministry announced from 10 Downing Street on 28th February the Law Officers of the Crown have been reappointed *en bloc* to their former posts, Sir HARTLEY SHAWCROSS, K.C., continuing as Attorney-General, Mr. JOHN WHEATLEY, K.C., as Lord Advocate, Sir FRANK SOSKICE, K.C., despite his defeat at the polls, retaining the office of Solicitor-General, and Mr. DOUGLAS JOHNSTON, K.C., that of Solicitor-General for Scotland. It is presumed that an early opportunity will be found to enable Sir Frank Soskice to regain a seat in the House of Commons. The profession will note with interest the appointment of Mr. HUGH DALTON, who remains a senior member of the Cabinet, as Minister of Town and Country Planning, an office that did not formerly carry Cabinet rank. Mr. Dalton has more than once demonstrated his personal interest in the kind of work which he will now be called on to perform, and solicitors may perhaps be allowed to hope for some clarifying and tidying-up legislation in the near future.

Sir Francis Smith

WE record with regret the death in London on 28th February, at the age of eighty-seven, of Sir FRANCIS EDWARD JAMES SMITH, President of the Council of The Law Society in 1937–38. He was educated at Winchester and New College, Oxford, and took a second in Classical Moderations in 1884 and a second in *Literae Humaniores* in 1886. He was admitted in 1889 after serving his articles with Sir Walter Trower, and joined the firm of Lee and Pembertons as a junior partner in 1890. In 1922 he was elected a member of the Council of The Law Society, in 1936 Vice-President and the following year President, when he received his knighthood. He was a Knight of Grace of the Order of St. John of Jerusalem.

A Philosophy of Law

IF laymen, including statesmen and heads of states, paid heed to the utterances of our great lawyers and reflected upon their meaning, the human race would not now be living in terror of hydrogen bombs and other horrors. The address on 23rd February by Sir WILLIAM FITZGERALD, K.C. (late Chief Justice of Palestine), to a joint meeting of the Royal African and Royal Empire Societies on the "Philosophy of Law" illustrates this. Sir William said that law was one of the elemental forces that ruled mankind, and the study of anthropology showed that it existed in the most primitive societies. Machiavelli, in a period when Europe was forming itself into kingships, urged the use of law as the instrument of the executive, but the spirit of the Renaissance prevailed over his doctrines and Grotius founded international law, which was obeyed because the conscience of the nation demand it. We were faced with the same question that confronted Socrates and Plato—should we be ruled by force or reason, should we accept laws because of willingness to obey them, or because they were laws made by ourselves, or should we submit

CONTENTS

to them because they were enforced by an executive? This was the problem of the clash between the ideologies of the East and the West. It is for statesmen both in the East and the West to realise that the clash is not fatally irreconcilable.

Survey of Footpaths

A SURVEY of all rights of way in England and Wales, which is now beginning, will be completed in three years' time. County councils are to compile definitive maps of footpaths, bridle roads, cart tracks, green lanes, driftways and metalled paths, with information on their condition, and the position of stiles, stepping stones, kissing gates and footbridges, pursuant to their duties under the National Parks and Access to the Countryside Act, 1949. The parish councils and council meetings are to help in the work. As a guide to the collection and recording of information, the Ministry of Town and Country Planning are now distributing to local authorities a memorandum, "Survey of rights of way," prepared by the Commons, Open Spaces, and Footpaths Preservation Society, in collaboration with the Ramblers' Association.

Chester and North Wales Incorporated Law Society

WE acknowledge with thanks the receipt from the Chester and North Wales Incorporated Law Society of a copy of the report of their committee, presented to the sixty-fifth annual meeting on 28th February, 1950. The Society now numbers 254 members, of whom forty practise in Chester, forty in Cheshire and 174 in North Wales. Forty-three members have been elected during the year. The committee has circulated its own considered revisions of the London agents' scale and recommends members to adhere to them. In general, the London agents' claims are conceded, subject to reservations with regard to fees for instructions for brief, etc. Correspondence has been conducted with local M.P.s with a view to securing the enactment in the Justices of the Peace Act that only barristers and solicitors shall be eligible for appointment as clerks to justices, and with clerks of the peace and of assize on the subject of costs allowed to prosecuting solicitors in cases heard by assizes and quarter sessions. On the latter subject, it appears that a minimum charge of £5 5s. per case is allowed. During 1949 there were five ordinary meetings and three special meetings of the poor persons' committee. During the year there were 155 new applications, and there were twelve pending and outstanding at the beginning of 1949, making the total number of applications to be dealt with by the committee 167. Of these, two were applications to take proceedings in the Chancery Division of the High Court. Four were applications to take proceedings in the King's Bench. Fifteen were applications by husbands in matrimonial suits to take proceedings, and two to defend.

Preservation of Local Records

SIR RAYMOND EVERSHED, Master of the Rolls, announced on 22nd February that a small committee was to be appointed to draw up legislative proposals for the better preservation, care and availability of local records. It will be remembered that a committee set up by LORD GREENE in 1946 did much good work. The present intention is to appoint a National Archives Council, in order to promote the closer co-operation of national and local authorities, universities, and libraries, a higher general standard of scholarship and expert technique, and a more vigilant protection of private archives from dispersal and neglect, as well as to secure proper facilities for responsible students. The name of the new committee will be the Master of the Rolls' Archives Committee (1949). It held its first meeting last November. It consists of Professor T. F. T. PLUCKNETT (chairman), Sir HILARY JENKINSON, Professor J. G. EDWARDS, Mr. C. J. NEWMAN (representing the Association of Municipal Corporations) and Mr. L. EDGAR STEPHENS (representing the County Councils Association). A number of bodies have been asked to appoint representatives whom the committee can consult as occasion arises. Among those who have accepted are the Church of England, the Historical Manuscripts Commission, the British Museum, the Country Landowners' Association and the Library Association. The secretary is Mr. E. W. DENHAM, of the Public Record Office. The potentialities of solicitors' offices as repositories of valuable records are by no means exhausted, and we respectfully submit that solicitors should interest themselves in the work of this committee and in any legislative changes which it proposes.

Civil Service Salaries

THE necessity for adjusting salaries in the Civil Service in better accordance with the cost of living has recently been officially recognised by The Law Society. Further support for an adjustment is to be found in an editorial article in the current issue of the journal of the Association of H.M. Inspectors of Taxes. It states: "It is quite possible that the Chorley award is now outdated and insufficient and that a completely new and much more extensive inquiry into the question of Civil Service conditions and remuneration will be necessary if recruits of sufficient calibre and in adequate numbers are to be obtained. In fact if the value of money continues to depreciate, some method will have to be found of periodically matching salaries with prices; otherwise, the civil servant will be squeezed out of existence." In discussing the difficulties of recruitment, having regard to present standards of payment, the article continues: "To cope with accountants, solicitors and other professional advisers, to say nothing of the many astute taxpayers who act for themselves, pedestrian qualities are of little value. We must have recruits of outstanding ability and keenness." The writer proposes that initial salaries be increased to £500, that review for promotion to the higher grade should take place one year after passing the final examination and should depend on qualification, not vacancies, and that the increments of £25 and £35 should become £50.

Recent Decisions

In *Kaye* v. *Levinson* on 21st February (*The Times*, 22nd February), the Court of Appeal (THE MASTER OF THE ROLLS, JENKINS, L.J., and HODSON, J.) held that where an order was made for the delivery of a statement of claim on 28th November, 1949, delivery of the statement of claim at 5.45 p.m. on that date would not enable judgment to be entered for the defendant, but the order was varied so as to require the statement of claim to be delivered before 4 p.m. on the date of the hearing of the appeal, as it was important that if a plaintiff was ordered to do something or have his action dismissed, he should be able to see beyond a possibility of doubt what it was required of him to do.

In *Houghton-le-Touzel* v. *Mecca, Ltd.*, on 21st February (*The Times*, 22nd February), BIRKETT, J., and a jury found for the plaintiff in an action for a penalty under s. 1 of the Sunday Observance Act, 1870, on the ground that the defendants were keepers of a dance hall at Brighton, known as "Sherry's" which was open on Sunday and used for unlicensed public dancing for entrance to which the public paid at the door. A penalty of £200 was awarded to the plaintiff, who appeared in person.

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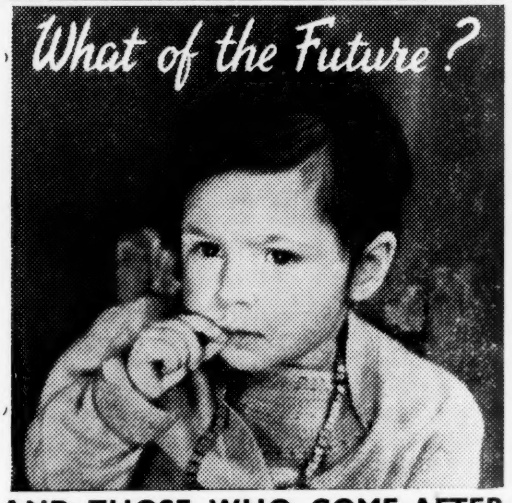

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TOWN AND COUNTRY PLANNING USE CLASSES: SHOP OR OFFICE

THE general objects of the Town and Country Planning (Use Classes) Order, 1948, and its companion Use Classes for Third Schedule Purposes Order are well known and there is no need to expound them at this date. An interesting point arises, however, as to the application of the first two use classes in these orders.

Class I is—

" Use as a shop for any purpose except as—

(i) a fried fish shop ;

(ii) a tripe shop ;

(iii) a shop for the sale of pet animals or birds ;

(iv) a cats-meat shop."

Class II is—

" Use as an office for any purpose."

Each order contains an article with interpretations of various words, and both " shop " and " office " appear in these articles, as follows :—

" ' shop ' means a building used for the carrying on of any retail trade or retail business wherein the primary purpose is the selling of goods (excluding refreshments other than light refreshments) by retail, and without prejudice to the generality of the foregoing includes a building used for the purposes of a hairdresser, undertaker, ticket agency or receiving office for goods to be washed, cleaned or repaired, or for other purposes appropriate to a shopping area, but does not include a building used as an amusement arcade, pin-table saloon, funfair, garage, petrol filling station, hotel or premises licensed for the sale of intoxicating liquors for consumption on the premises."

" ' Office ' includes a bank."

On first reading these two classes and their interpretation, one would think that the distinction between a shop and an office was clear and that any change from a shop to an office or vice versa would be a material change of use requiring planning permission and involving liability to payment of development charge. The distinction is, however, somewhat illusory, and there is plenty of scope for argument arising from the definition of " shop."

It will be seen that this definition can be divided into three parts :—

(1) " shop " *means* a building used for the carrying on of any retail trade or retail business wherein the primary purpose is the selling of goods by retail ;

(2) " shop " *includes*, without prejudice to the generality of (1), a building used for certain purposes ;

(3) " shop " *excludes* certain purposes.

It is unnecessary for the purpose of this article to consider the third part further. The first part of the definition is quite clear and would obviously exclude any use which did not principally consist of the sale of goods by retail. Now one might have thought that the second point, especially as it is introduced by the words " without prejudice to the generality of the foregoing " would not extend the first part of the definition to include uses in which the sale of goods by retail is not the principal business. But in some of the purposes specifically included, e.g., the hairdresser and the receiving office, the sale of goods by retail is not the principal business. Apart from the specific cases *included* there is the general inclusion of " other purposes appropriate to a shopping area," and it appears that this will cover many purposes in which the sale of goods by retail forms no, or certainly not the principal, part.

In the journal of the Royal Institution of Chartered Surveyors for September, 1949, a decision by the Minister of Town and Country Planning under s. 17 of the Town and Country Planning Act, 1947, is quoted in which the Minister decided that the use of a lock-up shop as a surveyors', valuers', auctioneers' and estate agents' office would be a purpose appropriate to a shopping area and would come within Class I of the order. The local authority whose decision was appealed from had rather naturally decided that this use fell within Class II and that accordingly to use a lock-up shop for this purpose required planning permission.

Now, if an estate agents' office is appropriate to a shopping area, so is a bank ; a bank is, in fact, probably more appropriate, for branch banks are very generally found in shopping areas. It seems, therefore, that an estate agents' office and a bank fall within Class I as well as within Class II, though one wonders whether this can have been what the draftsman intended.

Nor are estate agents' and banks the only offices which are to be found within shopping areas : insurance companies, accountants, solicitors and many others are to be found there. In innumerable cases buildings will be found with shops, in the normally accepted sense of the word, on the ground floor and offices on the other floors. However, the words of the definition are " appropriate to a shopping area " not " appropriate to the ground floor of a shopping area." It seems, therefore, to the writer, that, if the Minister was correct in his decision, most changes from shop to office and vice versa in a shopping area will not be development, for the office, as well as being an office in Class II, will also be a shop in Class I. Therefore, if, say, a firm of solicitors instal their office in a ground floor shop or an existing ground floor shop extends its business into office premises on the upper floors, no planning permission will be required for the change of use, nor will any development charge be payable. In addition to the change of use there may of course be some building operation, e.g., the insertion of a shop front, which may constitute development.

In an article at 93 SOL. J. 260 on development and development charge it was pointed out that the question of whether planning permission was required for development was to be settled by the planning authority or, on appeal, the Minister ; if either decided there was no development, there was no liability to charge. The Central Land Board only had jurisdiction, in connection with determining liability to charge, to decide, if the authority or the Minister had decided there was development, whether the development was exempted from charge by any of the various exemptions. The article said : " This aspect seems rather to have been overlooked in the ' Practice Notes,' and the Board seem to regard themselves as complete masters."

It is interesting to see what the Board's Practice Notes (First Series) have to say on the shop and office problem. Paragraph 86 on p. 25 of the Notes includes the following :—

" A bank is an office, not a shop. So is an estate agents' office."

" Apart from these express exclusions " (mentioned earlier in the paragraph) " the definition of a shop corresponds broadly with the popular meaning. To avoid doubt it is provided that buildings used by hairdressers, undertakers, ticket agencies and receiving offices for goods to be washed, cleaned or repaired, are ' shops.' The definition

of 'shop' (see S.I. 1948 No. 954) also includes the words 'a building used . . . for other purposes appropriate to a shopping area.' This phrase does not mean 'is in fact in a shopping area' or even 'in fact commonly exists in a shopping area.' Those meanings would include many houses and solicitors' and other offices. It will sometimes be necessary to study the legal definition, but the Board feel that most developers can assume that a 'shop' is what the ordinary person means by a 'shop'."

The Minister has already contradicted the Board's opinion that the estate agents' office is not a shop, and, in the light of this, it seems that they are equally wrong as to the bank not being a shop. This being so, the main substance of the Board's subsequent paragraph also appears to be wrong because "appropriate to a shopping area" does appear to mean at least "in fact commonly exists in a shopping area." If something commonly exists in a shopping area it can strongly be argued that it is appropriate there. In fact these paragraphs of the Notes seem a good example justifying the criticism levelled in the earlier article.

Any reader who may be concerned with a change from shop to office or office to shop, as popularly understood, would be well advised to submit a s. 17 application and try to persuade the local planning authority, or the Minister on appeal, that there is no development.

R. N. D. H.

Costs

AGREEMENTS WITH CLIENTS

AMONGST the miscellaneous questions that are constantly reaching us in connection with costs, one stands out. The question is "May we agree with our clients to be remunerated on a 'no cure, no pay' basis?" We will examine the question now, and, before giving a decisive answer, will look briefly at the law on the subject.

The question is bound up with the somewhat larger subject of agreements with clients as to the basis of remuneration. So far as non-contentious matters are concerned we have seen from earlier articles that there are two bases of remuneration, namely, scale remuneration and item remuneration, both of which are regulated by the Remuneration Order made under the Solicitors Remuneration Act, 1881.

Section 57 of the Solicitors Act, 1932, provides that with regard to non-contentious business, which is the type of business to which the order under the Act of 1881 relates, a solicitor is at liberty to make an agreement with his client, either before or after or in the course of the transaction, providing for the remuneration of the solicitor either by a gross sum, or by commission or percentage, or by salary or otherwise. The agreement must be signed by the party to be charged, but there is no necessity for the person who seeks to enforce it to have signed the agreement.

This section, it will be observed, extends the scope of r. 6 of the general order made under the 1881 Act. That rule, it will be remembered, provides that in the case of professional business to which the scale remuneration applies the solicitor may, by notice in writing given *before the business is commenced*, communicated to the client, elect to be remunerated according to Sched. II of the order. Once the business is undertaken, however, he is precluded from so electing and must content himself with the scale remuneration. If, however, upon investigation he finds that the scale remuneration is not going to recompense him for his labours, there is nothing to prevent him from laying the facts before his client and agreeing with the latter that the remuneration shall be upon some other basis than the scale fee laid down under the order.

In connection with non-contentious business then, an agreement may be made with the client for remuneration on *any* basis to which the parties may agree, and this may include a percentage of the amount involved, and may even extend to a "no cure, no pay" agreement. Thus a solicitor may agree with his client to represent him at a sale of property by auction, and to bid on the client's behalf, and to take all necessary steps in connection with the investigation of title, and the preparation and completion of conveyances in respect of any properties so purchased, for an inclusive fee of, say, 10 per cent. of the purchase price, no fee being chargeable in the event of no property being conveyed eventually into the name of the client.

If, when the time comes to pay, the client declines to honour the agreement on the ground that it is unreasonable, then the court may refer the matter to a taxing master. It will do this, however, only on evidence that the agreement is in fact unreasonable, and will not refer the matter where the allegation of unreasonableness is entirely unsupported by such evidence (see *Re Palmer* (1890), 45 Ch. D. 291). An example of an unreasonable agreement is provided by the case of *Re Montague Scott and Baker* [1889] W.N. 40. In that case there was an agreement to pay, in addition to the scale charges for negotiating a loan and completing a mortgage, a bonus at the rate of 2 per cent. for procuring the loan. North, J., pointed out that the solicitor was, in fact, charging twice for the same work, namely, he was claiming scale remuneration, and, in addition, a bonus or commission, and that this was unfair and unreasonable.

One other point arises with regard to an agreement between the solicitor and his client as to the basis of remuneration for non-contentious work, and that is how far such an agreement binds a third party. Is the mortgagor bound to pay the mortgagee's solicitor's costs, whatever the basis upon which the latter is remunerated, or can he object on the ground that he is not a party to the agreement? It will be recalled that in the case of *Hester* v. *Hester* (1887), 34 Ch. D. 607, it was decided that a mortgagor was bound to pay the mortgagee's solicitors' charges where the solicitor had elected under r. 6 to be paid on the basis of Sched. II and had given the requisite notice to the mortgagees who were his clients, although the mortgagor had had no notice of the election. On the basis of that decision there is no doubt that the mortgagor would, similarly, be bound where the mortgagee and his solicitor had made an agreement as to the basis of the latter's remuneration, notwithstanding that the mortgagor was not a party to the agreement and had had no notice of it. The agreement must, however, be fair and reasonable, and if it is not the court may reduce the amount of the remuneration fixed by the agreement (see the proviso to s. 57 (4) of the 1932 Act).

So much, then, for agreements with regard to non-contentious matters. Now what of contentious cases? The answer here will be found in s. 59 of the Solicitors Act, 1932, which provides that a solicitor may make an agreement in writing with his client as to his remuneration in respect of contentious business done or to be done. Such agreement may provide for his remuneration to be by way of a gross sum, by salary or otherwise, and at either a greater or a less rate than that at which he would otherwise have been entitled to be remunerated.

This provision is very wide and, indeed, it appears to be wide enough to include a "no cure, no pay" agreement in respect of contentious work, so that there seems, on the face of it, nothing to prevent a solicitor from making such an agreement, say, in the case of a claim for a debt. There is, in fact, no objection, but he must have regard to s. 63 of the Act, which expressly states that nothing in the preceding provisions gives validity to an agreement by which the solicitor employed to prosecute an action or suit or other contentious proceeding purchases any interest, or part of an interest, in the proceedings; nor does it give validity to an agreement whereby the solicitor stipulates for payment only in the event of success.

We have examined in a previous article the meaning of the term "non-contentious" in relation to the application of Sched. II of the Solicitors' Remuneration Order, 1883, and we noticed that the view had been expressed that business could be contentious although not, in fact, transacted in any court or in the chambers of a judge or master. However, we are not left in any doubt as to the meaning of the term "contentious business" in the 1932 Act, for it is defined by s. 81 (1) of the Act as including any business done in any court.

This clears the air somewhat, for it defines what may and what may not be the subject of a "no cure, no pay" agreement. There is, it is clear, no objection whatever to such an agreement being made in relation to debt collecting, the remuneration being by way of a percentage of the amount recovered. It must be made perfectly clear, however, by the solicitor that in the event of litigation becoming necessary then he will be entitled to charge only his proper fees in accordance with the regulations governing the particular court in which the proceedings are taken. If he does not do this then, apart from the provisions of s. 63, *supra*, he will run a very grave risk of infringing the law against champerty.

The same consideration, it is thought, will apply where an agreement is made for a gross sum remuneration in respect of a debt recovery where litigious proceedings are involved, and the only safe way, where there is to be an agreement for other than scale remuneration, is to exclude expressly from the consideration any proceedings in any court.

Section 60 (1) of the Act specifically provides that, in the event of another party becoming liable to pay the solicitor's clients' costs in the matter which is the subject of an agreement between the solicitor and his client, then the latter cannot recover more from his opponent than the amount which he has agreed to pay his solicitor himself. This is, of course, merely an application of the rule of law that the award of costs to one party is nothing more than a direction that he shall be indemnified.

Any provision in such an agreement that the solicitor shall not be liable for negligence will be void (s. 60 (2)), and subss. (3) and (4) of the section provide that no action shall be brought upon such an agreement, but any party thereto may apply to the court and the latter will investigate the reasonableness of the agreement. The application is made by way of summons in chambers.

Then comes a somewhat curious provision, for subs. (5) states that, if any business covered by such an agreement is business in any action, the amount payable under the agreement shall not be *received* by the solicitor until the agreement has been examined and allowed by a taxing master of the court. As we have seen, the combined effect of s. 63 and the law relating to champerty restricts very considerably the possibility of an agreement for other than scale remuneration in respect of litigious work, and the added impact of s. 62 (5) would in any case tend to discourage solicitors from making agreements with clients touching this class of work.

In any other case the client has the right within twelve months after he has made a payment under such an agreement to apply to the court to have the agreement re-opened, and the court may investigate its fairness and reasonableness and may order the costs covered by the agreement to be taxed.

The answer to the question is, therefore, that a "no cure, no pay" agreement may be made, but not in respect of litigious work.

J. L. R. R.

A Conveyancer's Diary

FUTURE LEGACIES AND INTERMEDIATE INCOME

It is so seldom that a statement in a textbook of the authority of Jarman on Wills is disapproved in terms by the bench that when such a thing happens the circumstances deserve some examination. In Jarman (7th ed., p. 1006) it is stated that "a residuary bequest which is deferred or contingent in its terms carries the income which accrues before it vests in possession." So far as this statement refers to deferred bequests of residue, it is no longer to be relied upon (*Re Gillett's Will Trusts* (1949), 93 Sol. J. 742).

In this case the testator devised the remainder of his real estate to his wife for her life, and directed that after her death it should fall into and form part of his residuary personal estate. He gave his residuary personal estate to his trustees upon the usual trusts for sale and conversion and upon trust to hold the capital and income, after payment of debts, etc., to raise and pay certain annuities to his wife and four other named annuitants, with power to utilise capital or income for this purpose; and as to any balance remaining of his residuary estate, the testator directed that it should be held in trust, in the events which happened, on the decease of the survivor of the annuitants as to one-sixth part for the testator's brother, E, absolutely, but if he should not then be living for his children in equal shares absolutely and as to the other five-sixths of the fund in various shares for other named persons, if such persons respectively should be living at the death of the survivor of the annuitants, with gifts over in similar terms to that in the case of E's share in favour of their respective children.

The effect of these dispositions was as follows. The gifts in favour of the testator's brother, E, and the other beneficiaries entitled to the balance of the residuary estate, were vested deferred gifts, liable to defeasance in each case if the primary beneficiary should predecease the survivor of the annuitant, in which event his children were to take; and the surplus income of the residuary estate not required to answer the annuities in the period between the deaths respectively of the testator and the survivor of the four annuitants was not expressly disposed of by the testator. At the date of the summons two of these annuitants were still alive and a large surplus of income had arisen, and by the summons the court was asked to determine the destination of this surplus. The alternatives before the court were either to direct the accumulation, during a period permitted by law, of the surplus income for the benefit of the persons entitled to deferred interests in the fund under the residuary

trust, or to direct the distribution of this surplus on the footing that it had not been disposed of.

This is a question on which no assistance can be derived from s. 175 of the Law of Property Act, 1925. That section provides, in effect, that (*a*) a contingent or future specific devise of realty, (*b*) a contingent or future specific bequest of personalty, (*c*) a contingent residuary devise of freehold land, and (*d*) a specific or residuary devise of freehold land to trustees, upon trust for persons whose interests are contingent or executory, shall, subject to the statutory provisions relating to accumulations, carry the intermediate income of that property from the testator's death, except so far as such income may be otherwise expressly disposed of. The provision does not deal with the case which arose here, which was a deferred, and not a contingent, gift, whatever is the subject-matter of the gift; nor do the amendments which this section made to the law as it existed before 1926 affect the established rule that a contingent residuary bequest of personalty, generally, carries the intermediate income.

The persons entitled under the residuary trust naturally relied on the passage from Jarman quoted above to show that in this respect there was no distinction between a contingent and a deferred gift, but on investigation it turned out that none of the authorities cited in support of the statement related to a gift which was purely a deferred gift, having no contingent flavour about it. On the other hand in *Re Oliver* (1947), 91 SOL. J. 421, on a will which was very similar in its main provisions to that in the present case, Jenkins, J., had expressed the view that it was well settled that a gift limited to take effect on a future date, as opposed to a contingent gift, does not carry the intermediate income, relying on the decision in *Weatherall* v. *Thornburgh* (1878), 8 Ch. D. 261, for this proposition.

Now it is impossible to discover any logical principle for the distinction between a deferred and a contingent gift in this matter of intermediate income, and in the present case Roxburgh, J., confessed that but for the trend of authority he would have it found it very difficult to explain why the latter should, and the former should not, carry the intermediate income where the gift in question was a gift of residuary personalty. It is a great pity that the opportunity was not taken, when s. 175 of the Law of Property Act, 1925, was on the stocks, to go a little further in eliminating the different treatment accorded to different types of gifts in this respect. But the weight of authority, especially certain observations in *Re Blake; Berry* v. *Geen* [1938] A.C. 575, indicated the existence of the distinction which had been implicitly accepted by Jenkins, J., and the result is that the rule that a deferred residuary bequest of personalty does not carry the intermediate income is now firmly buttressed by two recent decisions.

An attempt was made in the present case to distinguish the particular gift under consideration on the ground that the earlier authorities had dealt with deferred indefeasible gifts, but that the gifts under the residuary trust in this case were all defeasible in the event of the beneficiary failing to survive the survivors of the annuitants, and that a deferred defeasible gift should be classified together with contingent gifts for the purposes of this rule. This argument was not successful, and the rule can therefore be seen as all embracing once the deferred character of the gift has been ascertained as a matter of construction.

The result in the present case was that the surplus income available after provision was made for the continuing annuities was undisposed of. The case thus comes as a reminder not only of the existence of the rule but also of the inconvenience its operation brings about. It may be that where infants are indefeasibly entitled under a future but not contingent limitation and surplus income is available in circumstances similar to those which arise in this case, trustees may be able to use some of that income for the purpose of maintenance of the infants under the statutory power given by s. 31 of the Trustee Act, 1925 (for the purposes of maintenance contingent interests are specially provided for by s. 31 (2)). There was no mention of such a possibility in the present case, doubtless because the primary beneficiaries under the residuary trust were of age; the children of those beneficiaries, who could only take if their respective parents' interests were defeated, having nothing more than a *spes successionis* while their parents lived, were not persons in whose favour the statutory power of maintenance, widely drawn as that is, could be exercised. The case, therefore, as well as correcting a categorical statement of the law in a book of authority, may be commended to the draftsman who is called upon to prepare wills on a point of wider interest—the importance, when ultimate interests are deferred, of providing for the destination of the whole of the income of the fund during the period before the ultimate interests vest in possession, either by a trust for accumulation during one of the periods allowed by law or by an express trust for distribution, as the surplus income accrues, among the persons who will ultimately take the capital of the fund.

"A B C"

Landlord and Tenant Notebook

DILAPIDATIONS DURING TERM

THERE is comparatively little authority on the measure of damages to be applied when a landlord sues for breaches of repairing covenant during the term. This is partly due to the fact that most covenantee landlords have been content to wait till the lease expired and partly to the fact that they would in many cases be able to enforce their rights by taking proceedings for forfeiture. But now that tenants, no matter what their agreements may say, are, when the properties are dwelling-houses or farms, often very much in the position of holders of life estates, more interest may well be taken in the question of how damages are to be measured; a question which is mooted in a letter received from a correspondent who also raises that of the effect of altered standards of building repairs where the covenant was entered into before the war effected that alteration.

It is clear that in these cases, whatever may be the position when an action is brought after term expired (see *Jones* v. *Herxheimer* (1950), 94 SOL. J. 97 (C.A.), for recent authority on this), the cost of repairs is not *the* true measure of damages in an action brought during the tenancy. Directing the jury in *Doe d. Worcester School, etc., Trustees* v. *Rowlands* (1841), 9 C. & P. 734, Coleridge, J., visualised the case of a claim brought in the first year of a 100-year term, pointing out that the landlord need not and, indeed, might not be entitled to spend the money on the repairs; the proper question was, what was the damage to the reversion; and

the plaintiffs in that case, suing some seven years before the expiration of a 41-year lease, were awarded £40 of the £150 to £160 which, according to their expert, repairs to decayed and neglected buildings would cost. A few years later, a tenant covenantor successfully demurred to a claim which did not specify the length of term outstanding (*Turner* v. *Lamb* (1845), 14 M. & W. 412).

But as to the effect of emergency conditions, the nearest decision in point appears to be *Mills* v. *East London Union* (1872), L.R. 8 C.P. 79, in which the damage might be ascribed to the fact that the tenant, having received a notice to treat from a railway company, who had intended to build a branch or extension line, neglected the premises for some four years which passed before he assigned to them. The project was then abandoned, but the tenant was held liable for the consequences of the neglect.

The measure is, then, the difference between the value of the reversion as the premises ought to be and its value as they are (incidentally the limit prescribed by the Landlord and Tenant Act, 1927, s. 18 (1)), and *prima facie* the fact that the covenantor has been unable to carry out repairs at the same standard or the fact that a tenant likely to take the premises would not expect so high a standard will not entitle him to an abatement or relief. Though the two cases were concerned with dilapidations at the end of the term, I think that *Maud* v. *Sandars* [1943] 2 All E.R. 783, and *Eyre* v. *Johnson* [1946] K.B. 481, illustrating the effect of Defence Regulation building restrictions, show us which way the wind would blow. In the one the tenant did not make out his plea of illegality, because he had not applied for a licence, and the decision that he was not excused performance might possibly be referred to this omission; but in the other, application had been made and refused and the tenant could not legally do the repairs (which included some painting). It is true that the tenant had been neglectful long before the restrictions were imposed, and on that ground alone Denning, J. (as he then was), found against him. But the learned judge also decided in the landlord's favour on this ground: " . . . It seems to me that although illegality which completely forbids the performance of a contract may give rise to frustration in some cases, illegality as to the performance of one clause which does not amount to frustration in any sense of the word does not carry with it the necessary consequence that the party is absolved from paying damages"; and he applied *Matthey* v. *Curling* [1922] 2 A.C. 180, from which he cited Lord Buckmaster's " He has bound himself to do these definite acts, and it is no excuse that circumstances which he could not control have happened and have prevented his compliance."

In effect, the tenant covenantors in those two cases found themselves in the same position as the tenant defendant in *Paradine* v. *Jane* (1647), Aleyn 26, who, when he took his farm, had probably never contemplated the possibility of civil war or heard of his sovereign's Uncle Rupert; but when, in the course of the former, cavalry commanded by the latter destroyed his crops and he could not find the rent, he was told that he ought to have provided for such eventualities before. As regards war damage itself, the Landlord and Tenant (War Damage) Act, 1939, s. 1 (1), of course, altered the position; but, comprehensive as may be the definition, both in its original and its amended state, it does not cover a breach of obligation due to the general consequences of the war. So it would appear that, once a landlord covenantee can say to his covenantor tenant " The demised premises are worth less in the market than they would have been if you had performed the covenants," it will be no answer for the tenant to say " Oh, but the council wouldn't license the work, and anyway nobody expects two coats of paint nowadays."

Apart from war-time legislation and from the provision in the Landlord and Tenant Act, 1927, cited above, however, there are occasions when a tenant may be able to invoke statutory enactments designed to relieve him. There are the Law of Property Act, 1925, s. 147, and the Leasehold Property (Repairs) Act, 1938.

The Law of Property Act, 1925, s. 147, deals, however, only with (*a*) forfeiture and (*b*) internal decorative repairs; and excluded from its scope are, *inter alia*, breaches of covenants and conditions obliging a tenant to put premises into decorative repair, cases in which the sanitary condition of the property or the structure itself is in jeopardy, and those in which the obligation is to yield up in a specified state. When the provisions do apply the tenant can, on receiving the forfeiture notice under s. 146, apply for relief, which the court is to grant as to all or as to part of what is demanded if it considers the notice unreasonable. But, in considering the matter of reasonableness, regard is to be had, *inter alia*, to the length of term unexpired; it seems safe to assume that in a case in which, by reason of other protective legislation conferring security of tenure, the landlord cannot expect to recover possession when the term ends, the regard had to this feature will not be considerable.

The Leasehold Property (Repairs) Act, 1938, is wider in scope in that its provisions apply to any repair called for by the lease and to claims for damages as well as proceedings for re-entry. On the other hand, it applies only when the property is a house (of which part at least must be a residence) of a rateable value not exceeding £100, when the lease is for not less than 21 years, and when not less than five years remain of the term when the forfeiture notice is served or the action for damages commenced. Such an action cannot be commenced until a notice similar to a forfeiture notice has been served, and in either case the notice must mention the tenant's right to serve a counter-notice which, if served within 28 days, will prevent or stay further proceedings unless and until leave of (county) court is given. And in order to obtain leave the landlord will have to prove a *substantial* diminution in the value of the reversion, threatened or actual, or the need for complying with bye-laws concerned with safety, sanitary condition, etc., or the need for protection of the interest of the actual occupier, or that it is a case of " a stitch in time," or that some other special circumstances make the granting of leave just and equitable. Breaches of covenants to put premises in repair on or soon after taking possession are excluded from the Act. An illustration of the operation of the Act can be found in a case reported in the " Estates Gazette Digest of Cases " for 1940, at p. 42, *British Equitable Assurance Co., Ltd.* v. *Penmount Estates, Ltd.*, in which the leave of the Mayor's and City of London Court was sought to take forfeiture proceedings in respect of the leases, of which some 60 years remained unexpired, of two houses. The covenants alleged to have been broken provided for good and substantial repair and painting (good oil colours, two coats) at the usual intervals. The learned judge inspected the houses and found them in a bad way: a leaking gutter, no paint at all in some places, etc. The schedule of dilapidations had been served in July, 1939. The war had started when the application was heard, but shortages were only beginning to make themselves felt; nevertheless, the learned judge said that while *if times were normal* he would have given leave to bring an action for forfeiture he would in the circumstances refuse it on terms; the painting to be done, whatever pointing was necessary to be done as well, and such work to be done to roofs, gutters and pipes as was necessary to put them into a watertight and satisfactory condition.

But the two enactments are limited in scope, and in view of the law's general averseness to entertaining pleas of impossibility or difficulty of performance, as manifested in *Matthey* v. *Curling* and *Eyre* v. *Johnson*, I think that in most cases a tenant who fails to paint or paper as he has undertaken to will have to pay whatever represents the depreciation thereby occasioned. While not concerned with abstract justice I might mention that the judgment in the latter case which I cited also includes "The landlord has performed all his part of the bargain. The tenant had had the premises all this time," to which one might add the remark that the rent has remained the same though its purchasing power has diminished.

R. B.

PRACTICAL CONVEYANCING—VIII

Notices to Complete

Service of a notice to complete is often the first action which comes to the mind of a solicitor who is concerned about delay in completion of a purchase. There is no fixed form for such a notice and sometimes it is contained in a letter. The result appears to be that a notice to complete is often given without careful consideration of the purposes served by such a notice and without ensuring that the party giving the notice is in a position to do so.

Such notices are necessary on account of the equitable rule that, in contracts for sale of land, stipulations as to time are not regarded as of the essence of the contract unless they were made so by express terms, or the circumstances show that the parties must have intended time to be of the essence. Where time was not of the essence specific performance would be granted even if the plaintiff had failed to complete or to take steps towards completion by the dates fixed. Further, this equitable rule now prevails in actions at law for damages for breach of contract.

Even if time was not of the essence, if there has been delay it may be made so by service of a notice to complete. After service of the notice and expiry of the time given in it a vendor may treat the contract as repudiated and forfeit the deposit or resell and claim as damages the difference between the contract price and the price obtained on resale (*Harold Wood Brick Co.* v. *Ferris* [1935] 2 K.B. 199). A purchaser who has served a notice may recover his deposit, and need not be concerned about a possible action against him for specific performance.

Before serving such a notice it is very important to ensure that the party on whose behalf it is given is himself able to complete. In *Finkielkraut* v. *Monahan* (1949), 93 Sol. J. 433, the vendor served a notice on the purchaser. At the end of the time specified the purchaser was ready to complete but the vendor was not. Consequently it was decided that, as the vendor who gave the notice was also bound by it, the vendor was not entitled to specific performance, but the purchaser obtained rescission and return of the deposit.

The recent case of *Pedigree Stock Farm Developments, Ltd.* v. *R. Wheeler & Co., Ltd.* (reported in the *Estates Gazette*, 28th January, 1950, p. 66), provides a good example of the application of these rules. The property was agreed to be sold for £450,000, and the title was accepted, but the purchaser did not proceed further. The vendor served a fifteen-day notice to complete. The purchaser was a limited company with a nominal capital of £1,000, of which only three £1 shares had been issued, and so the vendor might have some ground for assuming that the purchaser could not complete. Vaisey, J., decided that the fifteen days named in the notice was far too short, and on that ground alone the notice was invalid. He pointed out that it was only one day more than the minimum time specified in The Law Society's Conditions of Sale, 1934, cl. 32, and expressed the view that such minimum was appropriate in the most simple cases only.

One must agree that fifteen days was too short in a transaction of this magnitude, but it may be doubted whether fourteen days is necessarily the minimum. In *Stickney* v. *Keeble* [1915] A.C. 386, at p. 419, Lord Parker said: "In considering whether the time so limited is a reasonable time, the court will consider all the circumstances of the case. No doubt what remains to be done at the date of the notice is of importance, but it is by no means the only relevant fact. The fact that the purchaser has continually been pressing for completion, or has before given similar notices which he has waived, or that it is specially important to him to obtain early completion, are equally relevant facts." There seems to be a suggestion on the same page of this judgment that in some cases a week's notice may be sufficient, but probably it would not be wise to rely on this.

A second ground for holding the notice to be void in the *Pedigree Stock Farm* case was that the vendor was not in a position to convey the property when he served the notice. In fact, he was under a contract to purchase and was still investigating title.

By way of summary it is useful to refer to the contention of Mr. C. D. Myles, for the purchasers, that for the notice to be good there must be three circumstances: "There must be improper delay on the part of the purchaser; there must be a reasonable time limit for completion given by the notice; and the vendors must have done everything they could on their part by putting themselves in a position to complete."

Useful precedents of notices are to be found in the Encyclopædia of Forms and Precedents, 3rd ed., vol. 14, p. 710, although it is better to allow rather more time than is indicated there.

J. G. S.

HERE AND THERE

WHAT'S IN A NAME?

If some Rip Van Winkle from the Middle Ages waking up in our midst were told that Houghton-le-Touzel had attacked Mecca, a vision would rise up before him of some twelfth century paladin with quartered pennant and golden armour carrying the Crusade to the very heart of the infidel world. It would not be readily within his comprehension that the gentleman with the fairy tale feudal-sounding name was a common informer, that "Mecca" in the apt and cultivated parlance of the twentieth century indicated, not the holiest place of an ancient conquering religious faith, but a chain of respectable catering establishments, and that the contest between them concerned some matter of dancing on Easter Sunday at a place near Lewes on the coast of Sussex, a place which, if he knew it at all (a doubtful contingency, for in his day it was but a small fishing hamlet), he would have called by some such name as Brighthelmstone. If it had been explained to him that one of the King's Justices had awarded Houghton-le-Touzel £200 for informing the court of an illegal dance, he would no doubt have pictured the discovery, by a feudal lord of the manor, of some secret infidel festival with horrible rites deliberately mocking, in that rude and remote place, the Feast of the Resurrection, but there again, as we all know, he would have been very wide of the mark. Being merely a citizen of united Christendom, he could hardly have projected his mind down the centuries to grasp the thorny problems of the coming English attitude towards amusements on the Lord's Day and avoidance of "the Continental Sunday."

ENFORCEMENT OF LAW

NOR will I venture to stick my finger between the tree and the bark of that embittered controversy but rather express a mild surprise at what seems to me personally the unmerited unpopularity suffered by common informers as a class. In the schoolroom (where solidarity against one's elders is a matter of course) it can be taken for granted, but among adult citizens assured on all hands of their power, through the ballot box, to make the laws by which they are governed, it becomes less easy to comprehend. After all, every age (some more, some less) has found it necessary to legislate in matters of minor detail to regulate the conduct of individual citizens. How shall these regulations be enforced? By the regular uniformed police? It would be about as appropriate as setting the Royal Armoured Corps to catch rabbits; the effort would be totally disproportionate to the result. In the normal way the quarry would see the hunters a mile off and go underground. If the police force were to follow them there it would require to be armed with altogether remarkable powers of entry into private premises and, this not being a "police state," that is something to which the free and lawful Englishman has never taken kindly. Apart altogether from that, the police just at the moment have their hands quite full enough with bandits and teen-age gangsters, none the less deadly for their immaturity, and need no secondary distractions from their very urgent major commitments.

NATIONALISED INFORMER?

ANOTHER alternative? We've tried one—the full-time, Government paid, plain-clothes, departmental "snooper." Well, the policy of maintaining an official corps of invisible spies out of the hard-paid proceeds of our taxation, in so far as it has been essayed, has not appealed to the instincts of the citizen either. Of course, all governing is to some extent coercion and no one likes being coerced anyway, but I venture to think that there are many who, on reflection, would prefer "private enterprise" enforcement by the common informer to the "nationalised" variety. To the dominant trend of political thinking just at the moment the preference is doubtless abhorrent, particularly as the profits or gains of the common informer are, one supposes, exempt from taxation, even when he follows no other calling, but what is dominant to-day may not be so to-morrow. Surely the real point is not whether the common informer ought to enforce the admitted law, but whether it ought to be the law at all. Birkett, J., seems to have given the right answer when an indignant juryman, after the Mecca case, protested in court against the possibility of people being encouraged to bring thousands of such actions. "I cannot go into that," said his lordship. "Policy is for Parliament and you have two days left in which to do something about it." (That was a couple of days before the great election.) The late Lord du Parcq (then du Parcq, J.) put his finger on the real point in a similar case in 1936: "The plaintiff . . . wished, I thought, to dispel some prejudice which he supposed might exist in my mind against common informers . . . I have only this to say . . . that, if anyone objects to them, there appear to me to be two legitimate ways in which he can get rid of them altogether. One of these is to observe the law so carefully that there will be nothing for common informers to inform about and the other is to take proper steps to get the law which is regarded as objectionable altered . . . . I may perhaps permit myself to say that probably the worst way of seeking to be rid of an Act of Parliament is to act as if it were not there in the hope that it will be ignored by others also."

RICHARD ROE.

REVIEW

An Introduction to the Law of Sales of Land, for Auctioneers, Estate Agents, Surveyors and Others. By RAYMOND WALTON, M.A., B.C.L., of Lincoln's Inn, Barrister-at-Law. 1949. London: The Estates Gazette, Ltd. 35s. net.

Solicitors usually look with suspicion on books on so technical a subject as the law of sale of land which are designed for laymen or for members of professions other than the legal profession. Some solicitors consider such books a nuisance because they tempt unqualified persons to undertake tasks for which they are not fitted and to try to use dangerously little learning. Others, more cynical, comment that in the long run such books will cause more work and profit to those who are qualified. The present writer believes that a carefully balanced book, addressed to auctioneers and others, on this branch of the law can fulfil a useful purpose and he approached the work now under consideration in the hope that it would impart sufficient knowledge to assist those to whom it is addressed to appreciate the legal problems which commonly arise and to co-operate more efficiently with solicitors.

The introduction is very interesting because it gives sound reasons why the complicated investigation of title is necessary, and the book will be useful for reference. On the whole it seems to achieve its purpose of conveying the information necessary to give a clear outline to those who are not lawyers. The early chapters relating to contracts are sound; they can be understood by a person not having prior knowledge of the subject and are, in general, very accurate. The facts of quite a number of reported cases are set out; this is helpful, as illustration often conveys meaning more quickly than description. Nevertheless there are a number of substantial defects, which should be remedied in a further edition. First, 168 pages of close print are taken up by the texts of the Sales of Land by Auction Act, 1867, the 1925 property statutes, the Crown Lands Acts, 1927 and 1936, and the Town and Country Planning Act, 1947. These matters should be omitted from any future edition because, for the persons for whom the book is designed, they will probably be useless; the alternative is that they will be dangerous. Secondly, the chapter on compulsory acquisition is not very helpful, mainly because it is almost entirely concerned with acquisition of land designated in a development plan under the Town and Country Planning Act, 1947. Few development plans will come into operation in the near future and other powers of compulsory acquisition will be very important for some years. Thirdly, various matters are discussed which do not fall to be considered by those to whom the book is addressed. For instance, the chapter on "Vendor and Purchaser Summonses," although well written, is out of place in this book, and the discussion of *ad hoc* trusts for sale (p. 261) and *ad hoc* settlements (p. 259) should be omitted as they are almost unknown even to counsel and solicitors. There are a number of errors of which the following are examples: there is a reference to town planning schemes on p. x, which suggests that they are still valid; the reference to development charges on p. 162 as *percentages* of increased value is misleading; the definition of an equitable easement on p. 173 omits essential words and so is quite wrong; there is no mention of the Lands Tribunal Act, 1949, and so there are a number of out-of-date references to official arbitrators (e.g., on p. 246 regarding modification of restrictive covenants, and on p. 286 regarding compensation for compulsory acquisition). The failure to mention the control of prices under the Building Materials and Housing Act, 1945, is a serious omission.

On the other hand the author makes (at pp. 90, 119 and 162) what is, at the present time, and for his purposes, a very good attempt to assess the effect of the Town and Country Planning Act, 1947, on conveyancing practice. On the whole the book will be useful to those to whom it is addressed and they can be recommended to purchase and use it. In the view of the writer, however, a new edition designed more carefully with the needs of intended users in mind would be even better.

NOTES OF CASES

HOUSE OF LORDS

LIBEL: CRITICISM OF FILM CRITIC

Turner *v.* Metro-Goldwyn-Mayer Pictures, Ltd.

Lord Porter, Lord Greene, Lord Normand, Lord Oaksey and Lord Morton of Henryton. 6th February, 1950

Appeal from the Court of Appeal.

The defendants, film producers, wrote to the B.B.C. concerning the plaintiff, a film critic, as follows: "We regret to inform you that in our judgment, based upon a considerable number of talks given by [the plaintiff], that critic is completely out of touch with the tastes and entertainment requirements of the picture-going millions who are also radio listeners, and her criticisms are on the whole unnecessarily harmful to the film industry . . ." The plaintiff complained that that meant that she was an incompetent film critic. There was also an allegation of slander over the telephone. The jury found that the words were defamatory and written and spoken with malice. Hilbery, J., held that the words were not capable of supporting the innuendo that the plaintiff was an incompetent film critic, but that they were, divested of the innuendo, defamatory in their natural and ordinary meaning. He therefore gave judgment for her for £1,500, the damages assessed by the jury, namely, £1,000 for the libel and £500 for the slander. The defendants' appeal was allowed. Cohen, L.J., agreeing with Hilbery, J.'s two rulings of law but being of opinion that, while there was evidence of malice to go to the jury, Hilbery, J., had approached that matter from the wrong angle, thought that there should be a new trial. Scott and Asquith, L.J.J., also affirmed Hilbery, J.'s two rulings of law, but they were of opinion that there was no evidence of malice, and that there must be judgment for the defendants. The plaintiff now appealed. The House took time for consideration.

LORD PORTER, discussing the question of libel, said that it was common ground that qualified privilege was rightly claimed by the defendants, but that it was said to be defeated by express malice on their part. The onus of establishing the existence of malice was on the plaintiff. Each piece of evidence must be regarded separately, and, even if there were several instances where a favourable attitude was shown, one case tending to establish malice would be sufficient evidence on which a jury could find for the plaintiff. If, however, on a careful analysis of each particular instance of alleged malice, the result were to leave the mind in doubt, that piece of evidence would be valueless as an instance of malice, whether it stood alone or was combined with a number of similar instances. Some ground for imputing malice was sought in the fact that the defendants' attitude was, perhaps wholly or, at any rate, to some extent, influenced by what was called "box office" motive; but, as was recognised in *Nevill* v. *Fine Arts & General Insurance Co., Ltd.* [1895] 2 Q.B. 156, at p. 171, they had a right to protect their interests, even when they were only pecuniary ones. In a matter so full of the possibility of divergent views and personal prejudices, it was impossible to establish the existence of malice; the matters submitted as evidence of malice were both individually and collectively insufficient for the purpose. Therefore, on the claim for libel, the plaintiff must fail. The issue of slander was disposed of by considerations similar to those applicable to libel. It was not disputed that the communication by telephone to the journalist was a matter of public interest. Therefore a plea of fair comment could be relied on. That communication was expressed opinion only, and therefore comment, and there was no evidence from which unfairness could be derived. Once the questions of malice or no malice and fair or unfair comment were decided in favour of the defendants, the case was at an end. However, the question whether the jury might have been misled by the summing-up and might have thought that, in order to succeed, the defendants must be fair-minded as well as honest had been argued. The jury might have come to the conclusion that both honesty and reasonableness were necessary and that the defendants were unreasonable and therefore malicious. The clearest direction was necessary to the effect that irrationality, stupidity or obstinacy did not constitute malice, though in extreme cases they might be some evidence of it. A defendant must honestly hold the opinion which he expressed, but no more was required of him. Had he (his lordship) come to the conclusion that the words were defamatory and the defendants malicious, he would have thought it necessary to submit the issue to another jury. As it was, the appeal should be dismissed.

The other noble and learned lords concurred in dismissal of the appeal. Appeal dismissed.

APPEARANCES: *Pritt*, K.C., *Shelley*, K.C., and *Harold Brown* (*Woodham Smith, Borradaile & Martin*); *Scott Cairns*, K.C., and *J. Megaw* (*Slaughter & May*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

COURT OF APPEAL

COAL MINE: NEGLIGENT SHOT-FIRING: COMMON EMPLOYMENT

Harrison *v.* National Coal Board

Tucker, Singleton and Jenkins, L.J.J. 21st December, 1949

Appeal from Jones, J.

A shot-firer in a mine detonated his charge prematurely in that he failed to give the plaintiff, a coal-face worker, the necessary warning. Jones, J., dismissed the workman's action against the defendant board on the ground of common employment. The workman appealed. By reg. 1 of the General Regulations made under s. 86 of the Coal Mines Act, 1911, it is the duty of the manager and under-manager of the mine "to carry out and to the best of their ability enforce" every order regulating the use of explosives. By art. 2 (*e*) of the Explosives in Coal Mines Order, 1934, made under s. 61 of the Act of 1911, the person firing the shot must, before doing so, see that all those in the vicinity have taken proper shelter. By art. 6 competent persons must be appointed in writing by the manager of the mine to perform the shot-firing, and no shot is to be fired by any other person. (*Cur. adv. vult.*)

TUCKER, L.J., in a written judgment, said that it was contended for the workman that, inasmuch as the shot-firer's negligence consisted of a breach of statutory duty, the defence of common employment had no application, because it would be an extension of that doctrine to hold that a workman impliedly agreed to take the risk of breaches by his fellow servants of statutory regulations enacted for his safety. He (his lordship) thought that all authority pointed to the contrary view (see *David* v. *Britannic Merthyr Coal Co.* [1909] 2 K.B. 152, and *Yelland* v. *Powell Duffryn Associated Collieries, Ltd.* [1941] 1 K.B. 164). The defence of common employment was a complete answer to the workman's claim unless he could establish that there was, in addition, a direct and absolute obligation on the board, or on some servant or agent of theirs for whose acts or omissions in the course of his employment they were liable, and who was not in common employment with the workman. It had been argued that there had been a breach by the manager and under-manager of the mine, by virtue of reg. 1 of the General Regulations. The question turned on the meaning of the words "carry out and to the best of their ability enforce." *Prima facie* that language envisaged that some provisions of the relevant orders could and must be actually performed by the manager and under-manager, or by some person on their behalf, and that other provisions imposed duties on specified persons who alone were qualified

to perform them, and as to which the manager and the under-manager were required to the best of their ability to enforce the performance. By art. 6 of the Order of 1934, a competent person had to be appointed by the manager as shot-firer, and no other person was to be entitled to carry out that operation. Article 2 (*e*) laid down the procedure to be followed by the person so appointed. It would be straining the use of words to say that it was the duty of the manager and under-manager to "carry out" art. 2 (*e*). They must no doubt enforce the performance to the best of their ability; but it was impossible to say that they must "carry out" something which they were expressly forbidden to do. The appeal must be dismissed.

SINGLETON and JENKINS, L.JJ., agreed. Appeal dismissed.

APPEARANCES: *Beney*, K.C., and *McLusky* (*Corbin, Greener & Cook*, for *Raley & Pratt*, Barnsley); *Fenwick*, K.C., and *G. W. Wrangham* (*Solicitor, N.C.B.*, for *C. M. H. Glover*, Doncaster).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

RENT RESTRICTION: HOUSE RENDERED UNINHABITABLE BY WAR DAMAGE

Morleys (Birmingham), Ltd. *v.* Slater

Eversheed, M.R., Somervell, L.J., and Hodson, J. 24th January, 1950

Appeal from Birmingham County Court.

A house within the Rent Restriction Acts occupied by the defendant tenant was, in November, 1940, damaged by a German bomb, and the tenant thereupon moved away from it with his family, continuing to pay rent at an agreed reduced rate. The house remained uninhabitable, but was occupied by the tenant when he received notice to quit from the plaintiff landlords in July, 1949, and being used by him in connection with his business as a rag-and-bone merchant. The landlords' claim to possession, founded on the contention that, owing to the damage, the house had ceased to be let as a separate dwelling for the purpose of protection by the Rent Restriction Acts, was dismissed. They now appealed.

EVERSHED, M.R., said that the proper test in such a case was whether the house in question could be said to have substantially ceased to exist. It was not sufficient, to deprive the tenant of the protection of the Acts, that a house had become uninhabitable—it might be merely temporarily—when notice to quit was given. The mere fact of its existing uninhabitability did not prevent a house from still being let as a separate dwelling. This house had neither been demolished nor been converted into a different kind of building. It remained substantially the same house after the damage, and was still in the occupation of the tenant. The tenancy accordingly remained protected. *Ellis & Sons Amalgamated Properties, Ltd.* v. *Sisman* [1948] 1 K.B. 653; 91 SOL. J. 692, was to be distinguished on the ground that the damaged house there had been demolished and a new house erected on the site which had not yet become habitable or occupied by the tenant when the contractual tenancy was determined. Appeal dismissed.

SOMERVELL, L.J., and HODSON, J., agreed.

APPEARANCES: *Ashe Lincoln*, K.C., and *G. Grove* (*Beckingsales & Naylors*, for *Joseph Cohen & Cowen*, Birmingham); *Geoffrey Green* (*Swepstones*, for *Parkhouse & Allee*, Birmingham).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

BANKRUPTCY PETITION: FOUNDED ON UNPAID RATES

In re McGreavey

Sir Raymond Eversheed, M.R., Somervell and Jenkins, L.JJ. 9th February, 1950

Appeal from Divisional Court in Bankruptcy.

The Benfleet Urban District Council issued a demand for rates which admittedly were due to the council in respect of a stadium. The debtor and his partner committed an act of bankruptcy and the council presented a bankruptcy petition against them which was founded on the unpaid rates. A receiving order was made by the registrar of Southend County Court with the consent of the debtor's partner, but the debtor appealed to the Divisional Court in Bankruptcy on the ground that a petition could not be founded on unpaid local rates. The Divisional Court (Romer and Harman, JJ.), in a considered judgment, held that a sum due for rates was clearly provable in bankruptcy and was a debt within the meaning of s. 4 (1) of the Bankruptcy Act, 1914; the court relied chiefly on s. 33 of the Act, which is analogous to what is now s. 319 of the Companies Act, 1948, and further, on the decision of Crossman, J., in *In re North Bucks Furniture Depositories, Ltd.* [1939] Ch. 690, where it was held that a local authority could petition to wind up a limited company for unpaid rates. The court held that it would be a lamentable anomaly if it were the law that arrears of rates were a good debt on which to found a petition for winding up a limited company, but not a good debt to found bankruptcy proceedings if the debtor happened to be an unincorporated association, and dismissed the appeal. The debtor appealed further.

SOMERVELL, L.J., who delivered the judgment of the court, said that there was no previous case on record where a bankruptcy petition was founded on non-payment of rates: it was common ground that unpaid rates could not be recovered by action. However, the term "debt" in s. 4 of the Act did not merely refer to a debt in a pleading or procedural sense; having regard to the provisions of ss. 1 to 4 of the Act, the court came to the conclusion that the council was a creditor and the sum due on unpaid rates a debt within the meaning of s. 4. There should be uniformity in the matter and a local authority should be allowed to petition in bankruptcy like another creditor, where rates were unpaid. Since rating authorities were in the position of preferential creditors, it was only right that they should be entitled to petition in bankruptcy. Appeal dismissed.

APPEARANCES: *V. R. Aronson*, K.C., *M. V. S. Hunter* and *K. T. Savin* (*Percy Haseldine & Co.*); *Harold Christie*, K.C., *Caplan* and *N. C. Lloyd-Davies* (*Zeffertt, Heard & Morley Lawson*, for *Heard & Coleman*, Hadleigh, Essex); *C. W. Chandler* (*Solicitor for the Board of Trade*).

[Reported by CLIVE M. SCHMITTHOFF, Esq., Barrister-at-Law.]

CHANCERY DIVISION

WILL: GIFT: "ALL MY BELONGINGS": FREEHOLD COTTAGE

In re Price; Wasley *v.* Price

Romer, J. 26th January, 1950

Adjourned summons.

By a home-made will, dated 9th August, 1946, the testator left "all my belongings to my daughter I.M.P. to my wife furniture to do as she like all my belongings to be sold within eight weeks of my death and the money to be invested and to draw the interest up to my daughter I.M.P. is twenty-five years of age then to do as she please." The testator, who died on 21st October, 1948, left the following estate: cash at the bank, some £550; funeral benefit, some £17; live and dead farming stock, some £238; income tax post-war credits, some £32, and a freehold cottage valued at £1,500 in which he lived with his wife and daughter. The question before the court was whether the freehold cottage was included in the gift of "all my belongings" or whether there was, in so far, an intestacy.

ROMER, J., said the ordinary meaning of the expression "belongings" was personal property. In the "Shorter Oxford Dictionary" the word "belongings" was defined as "goods, effects." This view was not at variance with the decisions of Eve, J., in *In re Bradfield* [1914] W.N. 423, or Bennett, J., in *In re Mills' Will Trusts* (1937), 106 L.J. Ch. 159,

because in neither of those cases was the mind of the learned judge applied to real estate. There was nothing on the face of the will to lead to the conclusion that the ordinary and natural meaning of the word " belongings " should be excluded in the present case. On the contrary, the direction to sell within eight weeks showed that the testator had not in mind his house, which was the home, not only of his daughter, but also of his wife ; the direction for sale was wholly inappropriate to the cottage, though perfectly apt and intelligible in regard to the rest of the testator's assets. It followed, partly from the ordinary meaning of the word " belongings " in the English language and partly from the construction of this particular will, in the light of the surrounding circumstances, that " belongings " had to be given the same meaning as it received in *In re Mills' Will Trusts*, viz., the residual personal estate. Consequently, the gift of " all my belongings " did not comprise the freehold cottage, but the testator died intestate so far as that freehold property was concerned.

APPEARANCES: *Winterbotham; R. S. Lazarus; T. A. Burgess; Beswick* (*Waterhouse & Co.*, for *Winterbotham, Gurney & Co.*, Cheltenham).

[Reported by CLIVE M. SCHMITTHOFF, Esq., Barrister-at-Law.]

WAR DAMAGE: VALUE PAYMENT: OPTION OF PURCHASE

In re Johnston's Application

Harman, J. 21st February, 1950

Case stated under the War Damage (Valuation Appeals) Act, 1945.

Under a lease dated 1st January, 1936, of office and shop premises at Plymouth for a term of eight years at a rent, after the first year, of £150, the tenant was entitled by written notice given before the end of the term to purchase the reversion in fee for £2,750. The option was never exercised. In March, 1941, the premises suffered a total loss by enemy action. The lease expired at Christmas, 1943, when the site reverted to the freeholders. A value payment had been made under the 1943 Act of £2,380, and the case was stated by the Tribunal under the 1945 Act at the instance of the surviving freeholder. The question raised was whether the value of the option of purchase should be taken into account in apportioning the compensation, and the Tribunal so decided. (*Cur. adv. vult.*)

HARMAN, J., said that under s. 10 of the War Damage Act, 1943, the relevant unit for the purpose of awarding the value payment was the whole subject-matter of the demise. The question was whether the option of purchase was to be taken into consideration, as the Tribunal had decided, or to be disregarded, as the appellant (the landlord) contended. There was no doubt that immediately before the damage occurred, the existence of the option increased the leaseholder's interest, but diminished that of the freeholder. When the damage occurred the leaseholder lost everything, for the lease became valueless and the option was not worth exercising. It was contended that the option was an " incident " of the proprietary interest within s. 12 (3) ; on the other hand the landlord contended that it was no part of the lease, but an independent collateral bargain (*Woodall* v. *Clifton* [1905] 2 Ch. 279 ; *In re Leeds and Batley Breweries* [1920] 2 Ch. 548). But s. 12 in its natural meaning intended to apportion the value payment between the parties in proportion to the loss suffered. He therefore held that the Tribunal was right in deciding that the option was an incident which the proprietary interests had at the material date, and which affected their value in the market. The figure for its value had been agreed.

APPEARANCES: *C. R. D. Richmount* (*Wedlake, Letts and Birds*, for *Gidley, Wilcocks & Maddock*, Plymouth) ; *C. Russell*, K.C., and *G. G. Slack* (*Gregory, Rowcliffe & Co.*, for *Bond, Pearce, Eliott & Knape*, Plymouth).

[Reported by H. LANGFORD LEWIS, Esq., Barrister-at-Law.]

KING'S BENCH DIVISION

DIVISIONAL COURT

RAILWAYS: ACCOMMODATION CROSSING: DUTY TO SHUT GATES

Copps *v.* Payne

Lord Goddard, C.J., Lynskey and Sellers, JJ.
12th January, 1950

Case stated by Essex justices.

The defendant was charged with contravening s. 75 of the Railways Clauses Consolidation Act, 1845, by omitting to shut and fasten gates, set up on either side of a railway for the accommodation of the owners or occupiers of the adjoining lands, as soon as he and the carriage under his care had passed through. The gates were set up where a road and public footpath crossed the railway, and on each gate a notice stated that failure to close the gates entailed a penalty of 40s. The road and footpath led directly off the highway, and the road only ran to private premises. The railway was built under a special Act which expressly incorporated the Railways Clauses Consolidation Act, 1845. When it was built, the road was an occupation road for the use of owners or occupiers of the premises, and the gates were set up under s. 68 of the Railways Clauses Consolidation Act, 1845, the crossing being an " accommodation crossing." The road was only used by vehicles owned by or having business with the owners or occupiers of the premises. For many years, between 5.30 a.m. and 9.30 p.m., the gates had been opened and closed on weekdays by employees of the railway company, but the practice ceased in 1929. From 1930 onwards the repair and maintenance of the road was the responsibility of the highway authority. The railway was now vested in the Railway Executive. The justices dismissed the information, and the prosecutor appealed.

LORD GODDARD, C.J., said that s. 47 of the Act of 1845 imposed on railway companies the duty of maintaining, and managing the opening and closing of, gates where the railway crossed a public road. The question turned on ss. 47 and 75 of the Act, and the court must look at the circumstances existing when the gates were erected. If the railway when it was constructed crossed a public road, then the company had not only to erect the gates but also to maintain them ; but if at that time the gates had been erected for the accommodation of persons living in the neighbourhood of the line, the obligation of the company was to set up the gates, and the opening and closing of them was the obligation of persons using them. An alteration in the character of the road would not alter the obligation which was imposed at the time the line was made. The obligation remained as long as the gates were there. The justices had therefore come to a wrong decision in point of law.

LYNSKEY and SELLERS, JJ., agreed. Appeal allowed.

APPEARANCES: *T. F. Southall* (*E. Coleby*) ; *Hines* (*F. G. Perks*, for *Bates, Wells and Braithwaite*, Sudbury).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

DIVISIONAL COURT

FOOD AND DRUGS: NAIL IN SWEET

Lindley *v.* George W. Horner & Co., Ltd.

Lord Goddard, C.J., Lynskey and Sellers, JJ.
12th January, 1950

Case stated by the Leeds stipendiary magistrate.

A retailer sold to a customer some sweets manufactured by the defendant company. One of them contained a nail, which the customer, on discovering it, reported to the local food authority. The company were prosecuted under s. 83 (3) of the Food and Drugs Act, 1938, whereby : " Where . . . the authority are reasonably satisfied that the offence . . . was due to an act or default of " the manufacturer " and that the " retailer " could establish a defence under

s. 83 (1), they may cause proceedings to be taken against " the manufacturer " without first causing proceedings to be taken against the " retailer. The magistrate found that the nail came into the sweet during the process of manufacture, that the company had taken every precaution to prevent such an occurrence, and that in the circumstances they were not guilty of a criminal act or default within the Food and Drugs Act, 1938. The prosecutor appealed.

LORD GODDARD, C.J., said that, though the magistrate had found that all due diligence was used in the manufacture of these articles, nevertheless a nail was found in the sweet and that was extraneous matter. By s. 4 (4) of the Act of 1938, " where the food or drug in question contains some extraneous matter, it shall be a defence for the defendant to prove that the presence of that matter was an unavoidable consequence of the process of collection or preparation." In his opinion that did not cover this case: it could not be said that the presence of a nail in the sweet was an unavoidable consequence of the process, for it simply meant that the manufacturer or his servants did not notice the nail. If it had been noticed it would have been taken out and so " avoided." The Act imposed absolute duties quite apart from *mens rea*. In s. 83 (3), which was concerned with the act or default of the manufacturer or wholesaler, the Act did not speak of a *negligent* act or default: it provided that if the contravention were due to the act or default of the wholesaler, he should answer for that, just as if the contravention were due to the act or default of the retailer, and he must answer for it whether he had been negligent or not. In his (his lordship's) opinion there was no defence here to the summons, although it might be that the magistrate, having heard all the evidence, thought that there were matters which went in mitigation. In his opinion the case must be remitted to the magistrate with a direction that the offence was proved.

LYNSKEY and SELLERS, JJ., agreed. Appeal allowed.

APPEARANCES: *Gattie* (*Sharpe, Pritchard & Co.*, for *O. A. Radley*, Leeds); *Fenwick*, K.C., and *N. Harper* (*Hyde, Mahon & Pascall*, for *Wilkinson and Marshall*, Newcastle-on-Tyne).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

DIVISIONAL COURT

DANGEROUS AND CARELESS DRIVING: INFORMATIONS HEARD TOGETHER

R. *v.* Ashbourne Justices; *ex parte* Naden

Lord Goddard, C.J., Lynskey and Sellers, JJ. 13th January, 1950

Application for an order of certiorari.

On 7th April, 1949, the applicant appeared before Ashbourne justices to answer two informations, the first of which alleged dangerous driving and the second driving without due care and attention. She was convicted of the second offence. The two informations were heard together although the court did not obtain the formal consent of the applicant or her solicitor to the taking of that course. The applicant contended, among other things, that the procedure laid down by s. 35 (1) of the Road Traffic Act, 1934 (preferring of a charge of careless driving after dismissal of a charge of dangerous driving), had not been followed.

LORD GODDARD, C.J., said that at the hearing before the justices the prosecuting solicitor had in the course of his opening referred to the second summons without protest from the applicant's solicitor. It was clear that the two summonses had in fact been heard together. The chairman of the justices had stated in his affidavit that, where two summonses were issued against the same defendant, it was the practice of his court to hear both cases together. That was a sensible practice, but it was desirable that the question, " Do you consent to the two summonses being heard together? " should be put specifically to a defendant. The court thought that the justices were justified in assuming that the applicant's solicitor did consent to both charges being heard together. Even if there was an irregularity in the proceedings, it did not follow that the court should grant an order of certiorari. Certiorari was granted where an inferior court acted without jurisdiction. Consent could not give a court jurisdiction which it did not possess, and a conviction recorded in such circumstances would be quashed. So, too, if there were irregularities which caused injustice, for example, where a person was convicted without having an opportunity of being heard in his defence, the court would grant an order of certiorari. But in the case of a mere irregularity the court had a discretion in the granting of the order, and would inquire if any injustice had been done. Here, the points taken by the applicant, even if all were assumed in her favour, were of a technical description. The whole of the evidence was heard, and the justices were told that the applicant could not herself give evidence because, owing to her injuries, she had no recollection of the accident. The justices had the evidence before them, the case was fully heard, and they decided to convict her on the second summons. No injustice had been done, and the application failed.

LYNSKEY and SELLERS, JJ., agreed. Application refused.

APPEARANCES: *John Hobson* (*Hosking & Berkeley*, for *Bertram Mather & Co.*, Chesterfield); *Dineen* (*Kingsford, Dorman & Co.*, for *H. Wilfrid Skinner*, Derby) (justices).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

SCHOOL TEACHERS: WAR-SERVICE PAY SUPPLEMENT

Turburville and Another *v.* West Ham Corporation

Byrne, J. 17th January, 1950

Action.

The plaintiffs were two school teachers employed by the defendant corporation. They claimed to be entitled under a resolution of the corporation of 23rd May, 1939, to have their salaries made up, while they were in the armed forces, to the salary increase granted by the Burnham Committee from 1st April, 1945, although they were demobilised from the forces in November, 1945. By the resolution in question the corporation had resolved that employees of theirs who might be called up for service with His Majesty's forces should have their pay and allowances in respect of that service augmented by the corporation " to such a sum as will equal the amount of the salary or wages received by them at the date of their being called up for . . . service with such increments if any of their grades " as they would otherwise have received.

BYRNE, J., said that while the plaintiffs had been in the forces the corporation had paid them the difference between their service pay and the salary which they would have received under the 1938 Burnham scale. The resolution of May, 1939, had become part of the plaintiffs' contracts of service. He was unable to accept the corporation's contention that the plaintiffs were not entitled under that resolution to the benefit of the increased scale which came into force in April, 1945. Judgment for the plaintiffs.

APPEARANCES: *Gardiner*, K.C., and *Douglas Lowe* (*E. G. Floyd*); *Harold Williams*, K.C., and *Squibb* (*E. E. King*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

PROBATE, DIVORCE AND ADMIRALTY DIVISION

DIVISIONAL COURT

MAINTENANCE: CONSENSUAL SEPARATION

Baker *v.* Baker

Lord Merriman, P., and Pearce, J. 16th December, 1949

Appeal from Manchester justices.

The justices found the appellant husband guilty of wilful neglect to maintain the respondent, his wife, and ordered him to pay her maintenance. The wife had left her husband, but a summons for (constructive) desertion taken out at the same time as that alleging wilful neglect to maintain had been dismissed at an earlier hearing.

LORD MERRIMAN, P., said that the case was an application of the principle that, if a wife was living separate and apart from her husband, it was not enough for her to set up that he had so much money and she needed maintenance. The point was the nature of the parting. If she could prove desertion, she was entitled to a maintenance order on that ground. Equally, if she could prove, and the burden was on her, that the consensual separation was on the express or implied basis that the husband undertook to be responsible for her maintenance, she was entitled either to the agreed amount (if there were one) or to a reasonable amount according to statute. But if it were a consensual separation, and not desertion, she had no case at all unless she could show that the separation was on the express or implied basis that the husband had accepted a liability to maintain her. It was clear that the justices here must have dismissed the charge on the ground that, at the highest, the wife had proved a consensual separation. It being established that there was no agreement to pay 15s. a week as a condition of the separation, and there being no other evidence on which it would be possible to find that such a financial arrangement was an implied term of the separation, it was impossible to uphold the justices' finding. It had ignored the vital principle, that, unless some grave and weighty matter justified a wife in leaving home, she was not entitled to maintenance save in the exceptional case of a consensual separation with an agreement attached to it that the husband would maintain her. There was no evidence of such a matter and the appeal must succeed. There was, however, nothing here to prevent the wife from putting herself right to-morrow, and if she were content to do so then her rights would be very different.

PEARCE, J., agreed. Appeal allowed.

APPEARANCES: *Ruttle* (*Derrick Bridges & Co.*, Barnet); *Crispin* (*Mills & Morley*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

COURT OF CRIMINAL APPEAL

CONFESSION: ADMISSIBILITY

R. *v.* Evans

Lord Goddard, C.J., Humphreys and Sellers, JJ.
20th February, 1950

Appeal from conviction.

The appellant was convicted at the Central Criminal Court of the murder of his infant child. Before the justices he was charged with the murder of both his wife and his child, and he was committed on both charges. In accordance with practice two indictments were preferred and the prosecution elected to proceed first with that which related to the murder of the child. The appellant had made several inconsistent statements with regard to what had occurred, in the last of which he had confessed to the murder both of his wife and child. Lewis, J., allowed the statement in relation to both of the alleged murders to be given in evidence in the case tried by him.

LORD GODDARD, C.J., giving the judgment of the court, said that the substantial ground of appeal was that the statement should not have been admitted. The decision of a question of this kind depended on the particular facts. It had been contended that a statement like this could only be admitted where it was sought to prove a system, or if the two murders were committed at the same time, forming part of one transaction. In the opinion of the court, however, the real test of the admissibility of the evidence was whether it was relevant to the question whether the appellant was guilty of the death of the child. In their view it was highly relevant, having regard to what the appellant had set out in the statement, for it showed what he had said with regard to the whole matter relating both to the wife and the child. Lewis, J., was right in admitting it. The appeal must be dismissed. Appeal dismissed.

APPEARANCES: *Malcolm Morris* and *Evelyn Russell* (*Freeborough & Co.*); *Christmas Humphreys* and *Elam* (*Director of Public Prosecutions*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

FRAUDULENT CONVERSION: FRAUDULENT INTENT

R. *v.* Hignett

Lord Goddard, C.J., Humphreys and Sellers, JJ.
21st February, 1950

Appeal from conviction.

The appellant, formerly a solicitor, was convicted at Sussex Assizes on seven counts of an indictment charging him with fraudulent conversion and on two counts charging him with obtaining credit by fraud. Mr. Commissioner Clark, K.C., sentenced him to four years' imprisonment on the counts charging him with fraudulent conversion and to nine months' imprisonment on those charging him with obtaining credit by fraud, the sentences to run concurrently. The charges of fraudulent conversion against the appellant were that he had received money from clients in the course of his practice as a solicitor to invest in first mortgages, and that instead of doing so he had retained the money for his own use. The defence to the first two counts of fraudulent conversion was that the appellant had had no fraudulent intent and that he had had authority to deal with the money in the way in which he did, or that he had reasonable grounds for thinking that he had such authority. It was complained for the appellant that, whereas fraudulent intent was an essential ingredient of the offence of fraudulent conversion, the general trend of the commissioner's summing-up had been that various matters had to be proved to secure a conviction for fraudulent conversion, but that it was not necessary to prove fraudulent intention. For the prosecution it was not sought to support the commissioner's direction, but reliance was placed on the power of the court to dismiss the appeal on the ground that there had been no substantial miscarriage of justice.

LORD GODDARD, C.J., giving the judgment of the court, said that the evidence against the appellant had been remarkable and almost staggering; but the commissioner's direction with regard to the law of fraudulent conversion was most unfortunate: he had told the jury that if the appellant had received money for a purpose and did not use it for that purpose they would be entitled to convict him of fraudulent conversion. Over and over again he had told them that if he had applied the money as the prosecution had said that he had applied it that was fraud. That, however, was not the law, and the court could not allow the convictions of fraudulent conversion to stand. They had always taken the view that a conviction must be quashed if there had been a complete misdirection. There had been no misdirection as regards the charges of obtaining credit by fraud, for the commissioner had told the jury that fraud was necessary in the case of those charges. As the appellant had not appealed against sentence the court had no power to alter the sentence of nine months' imprisonment on those counts. There was, however, another indictment against him on the file, and it was obvious that that must be tried. The court would order that it should be tried at the next Sussex Assizes, and that, if the nine months' imprisonment expired before then, the appellant should remain in custody, for he had once already broken his bail. Appeal allowed in part.

APPEARANCES: *Pensotti* and *Sells* (*Franklins*); *R. E. Seaton* and *J. S. Bass* (*Director of Public Prosecutions*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Mr. W. NEVILLE PRITCHARD JONES has been appointed Assistant Solicitor to the Cumberland County Council.

Mr. G. H. M. Scatliff, solicitor, of Brighton, was married on 15th February to Miss Joan Blundell, of Hove.

SURVEY OF THE WEEK

STATUTORY INSTRUMENTS

District of the River Dee (Aberdeenshire) (Annual Close Time) Order, 1950. (S.I. 1950 No. 229.)

District of the River Findhorn (Annual Close Time) Order, 1950. (S.I. 1950 No. 228.)

Draft **Double Taxation Relief** (Taxes on Income) (North Borneo) Order, 1950.

Draft **Grinding of Metals** (Miscellaneous Industries) (Amendment) Special Regulations, 1950.

Hampshire River Board Constitution Order, 1950. (S.I. 1950 No. 237.)

London Traffic (Prescribed Routes) (No. 2) Regulations, 1950. (S.I. 1950 No. 231.)

London Traffic (Prescribed Routes) (No. 3) Regulations, 1950. (S.I. 1950 No. 250.)

Purchase Tax (No. 4) Order, 1950 (S.I. 1950 No. 224.)

Purchase Tax (No. 5) Order, 1950. (S.I. 1950 No. 225.)

Representation of the People Act, 1949 (Date of Commencement) Order, 1950. (S.I. 1950 No. 242.)

This Order provides that those sections of the Act dealing with local government elections (other than the provisions as to the registration of local government electors) shall come into force on 11th March, 1950. This does not apply, however, to an election, notice of which was given before that date. The remaining provisions of the Act (other than those governed by s. 176 (2)) are to come into force on 3rd April, 1950.

Stopping up of Highways (Lancashire) (No. 3) Order, 1950. (S.I. 1950 No. 244.)

Stopping up of Highways (Lancashire) (No. 4) Order, 1950. (S.I. 1950 No. 251.)

Stopping up of Highways (London) (No. 2) Order, 1950. (S.I. 1950 No. 243.)

Stopping up of Highways (Middlesex) (No. 2) Order, 1950. (S.I. 1950 No. 245.)

Ware Potatoes (Amendment) Order, 1950. (S.I. 1950 No. 248.)

Warrington Water Order, 1950. (S.I. 1950 No. 246.)

NOTES AND NEWS

Professional Announcement

Messrs. J. L. CALDERWOOD, D. P. STORY and A. J. HARRINGTON, in partnership under the name of "Townsends," at 42 Cricklade Street, Swindon, Wilts, announce that they have taken into partnership Mr. EDWARD NORBURY RANDALL, who has been associated with the firm for some time past. The practice will be carried on under the same name as before.

Miscellaneous

Forty-two candidates out of 116 were successful at the Preliminary Examination held by The Law Society on 1st and 2nd February.

DOUBLE TAXATION RELIEF

A double taxation agreement has been concluded between the United Kingdom and North Borneo.

The arrangements, which have been published as a schedule to a draft Order in Council, follow the same pattern as the arrangements previously made with the other colonies.

Wills and Bequests

Mr. F. H. Crosskerry, solicitor, of Dublin, left £46,718.

Mr. W. M. White, solicitor, of Northwood, left £38,320.

SOCIETIES

The annual general meeting of the BLACKBURN INCORPORATED LAW ASSOCIATION was held on 17th February, 1950. Mr. A. Carter was elected president in succession to Mr. C. S. Robinson, O.B.E., and Mr. F. A. Heys, B.A., was elected vice-president. Mr. F. G. Howarth and Mr. J. W. Hollows, LL.B., were re-elected hon. treasurer and hon. secretary respectively. The committee in their report referred to the annual dinner which had been held in the town hall on 2nd December, 1949, at which Mr. Justice Willmer and Mr. Justice Morris, along with Mr. Commissioner Sharp, were guests of the association.

At the meeting of the UNITED LAW SOCIETY, held in the Gray's Inn Common Room, at 7.15 p.m., on 13th February, 1950, Mr. L. F. Stemp moved: "That the nationalisation of any further industries in this country would be disastrous." He based his arguments for the future on the experiences of the past nationalisation and said that full nationalisation leads to an all-powerful State and an all-powerful State leads to war as an escape from internal difficulties. Mr. B. Baker, in opposing the motion, said that the State was not an abstract ogre hovering over everybody, but consisted of individuals like ourselves who ultimately controlled the government. Other speakers were C. H. Winnett (visitor), A. J. Pratt, J. J. Maddocks, J. G. Ormerod, E. A. A. Shadrack (visitor), Miss V. J. Brown, F. J. Arnold (visitor), T. P. Burton, A. L. Vincent (visitor), S. E. Redfern and R. V. Cowles (visitor). Mr. Stemp replied, and the motion was carried by two votes in a house of twenty-one.

At the joint debate between the UNITED LAW SOCIETY and the GRAY'S INN DEBATING SOCIETY on 24th February, the motion for debate was: "That gentlemen are not wanted in the modern world." It was proposed by Mr. R. V. Cusack, of Gray's Inn, who had Mr. L. Bernstein as a seconder. Mr. C. Hardinge Pritchard and Mr. R. N. Hales, both of the United Law Society, opposed the motion. Other speakers were Miss J. King, A. Garfitt, G. Pimm, O. T. Hill, G. A. Preston, D. S. Paul, H. J. C. Stovin, R. Blackford, S. E. Redfern, T. P. Burton, E. D. Smith and M. Kahn. Mr. Cusack replied, after which the motion was put to the vote and lost by four votes.

The UNION SOCIETY OF LONDON, which meets in the Common Room, Gray's Inn, at 8 p.m., announces the following subjects for debate in March, 1950: Wednesday, 1st March, "That too many people have the vote"; Wednesday, 8th March, "That the Big Three should sit forthwith on the Bomb"; Wednesday, 15th March (ex-presidents' debate), "That Britannia has shot her bolt" (proposer: Mr. Alun Llewellyn; opposer: Mr. Hubert Moses).

All who desire to attend the 118th anniversary dinner of the UNITED LAW CLERKS' SOCIETY on 13th March should apply for tickets before Thursday, 9th March. The address of the Society is Maxwell House, Arundel Street, Strand, London, W.C.2.

OBITUARY

MR. V. D. HEYNE

Mr. Vivian Davidson Heyne, senior partner of Messrs. Hill, Dickinson & Co., of Liverpool, died recently, aged 72. He was admitted in 1904, was joint secretary of the Liverpool Steamship Owners' Association, and in 1938 was president of the Incorporated Law Society of Liverpool.

MR. J. B. LAZENBY

Mr. John Booth Lazenby, who was for fifty-two years Registrar of the Diocese of Newcastle-on-Tyne and Durham, died on 14th February, aged 88. He was admitted in 1884.

MR. T. W. LOVELACE

Mr. Thomas White Lovelace, solicitor, of Burnham-on-Sea, died on 11th February, aged 64. He was admitted in 1909 and had recently retired.

MR. A. K. MAPLES

Mr. Ashley Kilshaw Maples, retired solicitor, of Spalding, died on 14th February, aged 82.

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